(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

PLYMOUTH, ss

MISCELLANEOUS CASE
NO. 13 MISC 479028 (RBF)

DONNA BARRETT, DIANNE BUCKBEE, ROBERT CRONE, and VIRGINIA CURCIO,

Plaintiffs,

v.

ENTERGY NUCLEAR GENERATION COMPANY, PETER CONNOR, EDWARD CONROY, DAVID PECK, WILLIAM KEOHAN, and MICHAEL MAIN, in their capacity as Members of the Board of Appeals of the Town of Plymouth, and PAUL MCAULIFFE, in his capacity as Director of Inspectional Services and Building Commissioner for the Town of Plymouth,

Defendants.

MEMORANDUM AND ORDER ON DEFENDANT ENTERGY NUCLEAR GENERATION CO.'S MOTION FOR MANDATORY DISMISSAL OF PLAINTIFFS' CLAIMS

BACKGROUND

The Pilgrim Nuclear Power Station (Pilgrim or Plant) in Plymouth has operated as a nuclear power production facility since 1972, and is licensed by the Nuclear Regulatory Commission (NRC) to operate until 2032, but will be decommissioned in 2019. The nuclear fuel rods used by Pilgrim lose their ability to efficiently produce energy after four to six years of commercial use and are considered spent nuclear fuel (SNF). *New York v. U.S. Nuclear*

Regulatory Comm'n, 681 F.3d 471, 474 (D.C. Cir. 2012), citing Blue Ribbon Commission on America's Nuclear Future, *Report to the Secretary of Energy* 10–11 (2012). When fuel rods can no longer efficiently produce energy, they are transferred from the reactor core to racks within deep, water-filled pools for cooling. After the spent nuclear fuel has cooled sufficiently in the water-filled pools, it may be transferred to on-site dry storage, which consists of large concrete steel casks. *Id.* There is not now and has never been an off-site permanent or interim spent nuclear fuel storage in the U.S.

In 2013, Entergy Nuclear Generation Corporation (Entergy), the owner and operator of Pilgrim, applied for a zoning permit for the construction of a concrete pad for an on-site independent spent fuel storage facility (ISFSI). On March 27, 2013, the Director of Inspectional Services (DIS) granted Entergy the zoning permit #Z20130196 (the Permit). On July 24, 2013, the Plymouth Zoning Board of Appeals (Board) upheld DIS's granting of the Permit (Decision). On August 13, 2013, the plaintiffs,[1] residents of Plymouth owning property near Pilgrim, filed their complaint appealing the Board's Decision under G. L. c. 40A, §17 and G. L. c. 231A, §§ 1-2. In their complaint, the plaintiffs' argued that DIS should not have issued the Permit because a special permit was required under § 205-51 for the storage of SNF, a new use, not accessory to Pilgrim's power production facility, or, in the alternative, an amendment to the special permit for Pilgrim was necessary. Their claims of aggrievement included health, safety, and environmental harms, as well as a diminution in their property values.

On May 7, 2014, Entergy filed Defendant Entergy Nuclear Generation Co.'s Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Standing. On June 9, 2014, the plaintiffs filed Plaintiffs' Opposition to Defendant Entergy's Motion to Dismiss Plaintiffs' First

[1] Plaintiffs included Adam Augello, Christine Bostek, Donna Barrett, Diane Buckbee, Patricia Carr, John Carr, Carol Crone, Stephanie Crone, Robert Crone, Virginia Curcio, Aileen DeCola, Pine duBois, Sharl Heller, Jacqueline Hochstin, Frederick Paris, Norman Pierce, Phyllis Troia, and Richard Wickenden III.

Amended Complaint for Lack of Standing. On June 16, 2014, Entergy filed Defendant Entergy Nuclear Generation Co.'s Reply in Support of its Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Standing. Entergy's Motion to Dismiss was heard on June 20, 2014, and taken under advisement.

On August 14, 2014, the court allowed in part and denied in part Entergy's Motion for Summary Judgment. The court held that the plaintiffs' alleged health, safety, and environmental concerns were either preempted, not particularized, or not cognizable interests protected by the zoning scheme. The court did, however, find that plaintiffs within a two-mile radius of the Plant had presented sufficient evidence of standing on the basis of lost property values to defeat summary judgment. Consequently, plaintiffs residing further than two miles from Pilgrim were dismissed with prejudice.[2]

On July 26, 2016, a view was taken of Pilgrim. The initial phase of the trial, which included the presentation of expert and factual witnesses who testified to issues related to the remaining plaintiffs' standing claims,[3] was held on August 8-11, 2016. Testimony on standing was heard from Donna Barrett, Diane Buckbee, Virginia Curcio, Stephen Sheppard, George Tolley, Stephen DeCastro, Roger Durkin, Frank Mand, and Charles Minott. Exhibits 1-49 were marked. On August 10, 2016, Entery orally moved for mandatory dismissal of plaintiffs' claims under Mass. R. Civ. P. 41(b)(2). The court denied the motion without prejudice, to be renewed at the close of defendant's standing evidence. At the conclusion of the initial phase of the trial, Entergy orally renewed its motion for involuntary dismissal pursuant to Mass. R. Civ. P. 41(b)(2) and the court gave the parties leave to file post-trial memoranda on the issue of standing. On

[2] Plaintiffs Aileen DeCola, Phyllis Troia, Richard Wickenden III, Norman Pierce, Pine duBois, Sharl Heller, and Adam Augello were dismissed with prejudice.

[3] Plaintiffs Aileen DeCola, Patricia Carr, John Carr, Carole Crone, Stephanie Crone, Christine Bostek, Jacquelyn Hochstin, and Frederick Paris were also voluntarily dismissed from the case. The remaining plaintiffs at trial are Donna Barrett, Diane Buckbee, Robert Crone, and Virginia Curcio.

August 15, 2016, Entergy filed their Memorandum in Support of its Motion for Mandatory Dismissal of Plaintiffs' Claims. On August 16, 2016, the plaintiffs filed their Opposition to Defendant's Motion for Mandatory Dismissal of Plaintiffs' Claims. The motion was then taken under advisement. This Memorandum and Order follows.

STANDARD OF REVIEW

Massachusetts Rule of Civil Procedure 41(b)(2) provides that after the plaintiff in a bench trial "has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Mass. R. Civ. P. 41(b)(2). "The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence." *Id.* Accordingly, even if plaintiff has established a prima facie case, the judge "is free to weigh the evidence and resolve all questions of credibility, ambiguity, and contradiction in reaching a decision" whether the plaintiff has proved all the elements of their claim. *Skowronski v. Sachs*, 62 Mass. App. Ct. 630, 634 n.4 (2004); *Ryan, Elliot and Co., Inc. v. Leggat, McCall & Werner, Inc.*, 8 Mass. App. Ct. 686, 689 (1979).

DISCUSSION

Entergy has moved for dismissal of the plaintiffs' action on grounds that the plaintiffs have not carried their burden in establishing standing based on diminution in property values. Entergy asserts that the plaintiffs 1) have not established the violation of a right defined and protected by the applicable zoning scheme, 2) have not offered credible expert evidence they suffer a material violation of a private legal interest, and 3) have not demonstrated that their injury is particularized and different from harms felt by others in the community. The plaintiffs

oppose the motion and contend that they have made the necessary legal and evidentiary showing of standing based on injury to property values needed to proceed to a trial on the merits. For the reasons stated below, Entergy's Motion for Mandatory Dismissal of Plaintiffs' Claims is DENIED without prejudice.

A. Cognizable Right within Purposes of Zoning

In order to have standing to challenge the Decision, the plaintiffs must be "person[s] aggrieved." G.L. c. 40A, § 17; *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 117 (2011); *Planning Bd. of Marshfield v. Zoning Bd. of Appeals of Pembroke*, 427 Mass. 699, 702-703 (1998). The person aggrieved must be "one whose legal rights have been infringed." *Circle Lounge & Grille v. Bd. of Appeal of Boston*, 324 Mass. 427, 430 (1949). In essence, "property owners acquire standing by asserting a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest." *Harvard Square Defense Fund v. Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 492-493 (1989). As a general principle, the words "person aggrieved" are not be narrowly construed. *Marotta v. Board of Appeals of Revere*, 336 Mass. 199, 204 (1957). "Of particular importance, the right or interest asserted by a plaintiff claiming aggrievement must be one that the Zoning Act [or bylaw] is intended to protect, either explicitly or implicitly." *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 702 (2012).

To establish standing, the plaintiffs are required to identify an interest that G. L. c. 40A or the Plymouth Zoning Bylaw (Bylaw) is intended to protect. The plaintiffs claim that Entergy's new use of Pilgrim for a nuclear waste storage facility diminishes their property value. Because the preservation of property value is not an interest that the G. L. c. 40A scheme is intended to protect, diminution in the value of real estate is a sufficient basis for standing only where it is

"derivative of or related to cognizable interests protected by the applicable zoning scheme." *Kenner*, 459 Mass. at 120; *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 31 (2006) (recognizing diminution in value as protected interest when tethered to another recognized interest); *Sheppard v. Zoning Bd. of Appeal of Boston*, 74 Mass. App. Ct. 8, 12-13 (2009) (recognizing density as protected interest); *Boston Outdoor Ventures, LLC v. Aikens*, No. 08 MISC 386457, 2011 WL 1601539 at *6 (Land Ct. April 25, 2011) ("Diminution in property value, however, cannot stand alone and must be tied to a recognized harm."). Zoning legislation "is not designed for the preservation of the economic value of property, except in so far as that end is served by making the community a safe and healthy place in which to live." *Tranfaglia v. Building Comm'r of Winchester,* 306 Mass. 495, 503-504 (1940). "To untether a claimed diminution in real estate values from an interest the zoning scheme seeks to protect would permit any abutter who claims that any change in property use would diminish the value of property to obtain standing to challenge a zoning decision." *Kenner*, 459 Mass. at 123-124, quoting *Standerwick*, 447 Mass. at 32.

Therefore, the interest related to the diminution in real estate must be one that is protected by the local zoning bylaw. Such a protected interest can arise from a by-law's express language or implicitly from the intent of the by-law's provisions. *Marhefka v. Zoning Bd. of Appeals of Sutton*, 79 Mass. App. Ct. 515, 518 (2011); see, e.g., *Monks v. Zoning Bd. of Appeals of Plymouth*, 37 Mass. App. Ct. 685, 688 (1994) (by-law expressly protected visual character or quality of the neighborhood); *Sheppard*, 74 Mass. App. Ct. at 12 (requirements regarding lot size, lot width, and side yard are intended to further the general purposes of the by-law).

Here the plaintiffs' alleged harm to their property values is directly related to their request for zoning enforcement—that the Board failed to require Entergy to obtain a special

permit prior to issuing the Permit. Section 205-1 specifically enumerates that one of the general purposes of the Bylaw is "to conserve the value of land and buildings." The Light Industrial (LI) zoning district regulation (the district where Pilgrim is located) states "[t]his district is intended to reserve for a wide range of industries and certain commercial use of a light intensity, clean operational nature." Bylaw § 205-51. The Bylaw extensively regulates the types of uses permitted within LI districts. Special permits may be granted to allow the establishment of heavier industries that would not be detrimental to light industries in the zone or to adjoining zones. Under the special permit regulations, the Board must find that a proposed use is appropriate for the zoning district and will cause "no nuisance or adverse effect upon the neighborhood." Bylaw § 205-9(B)(1)(a)-(d).

The property value injury the plaintiffs have alleged relates to protected interests of the preservation of the value of land and buildings and is tied to the special permit mechanism of §205-9 and the LI district requirements of the Bylaw. Although Entergy is correct that the language "to conserve the value of land and buildings" is not found in §205-51 (LI district regulations), or elsewhere in the Bylaw, this does not mean that no district regulation is intended to safeguard the value of land and buildings. The general purpose in §205-1 of Bylaw, coupled with the additional requirement that a special permit may only be issued if there is a finding of no nuisance or adverse effect on the neighborhood, make the protection of property values an implicit interest protected by the Bylaw. See *Marhefka*, 79 Mass. App. Ct. at 521(density and dimensional requirements of the bylaw the plaintiff sought to enforce make protection of view an implicit interest protected by the bylaw); *Cent St. LLC v. Zoning Bd. of Appeals of Hudson*, 69 Mass. App. Ct. 487, 492 (2007) (frontage provisions plaintiff sought to enforce served as

mechanism preserving character of the neighborhood and giving rise to cognizable interest in property value).

The plaintiffs' claim of diminished property values, without more, does not confer standing. But where, as here, nearby residents assert diminution in property value as a result of Entergy's violation of the Bylaw's special permit provisions, including the requirement that the ISFSI not cause a "nuisance or adverse effect upon the neighborhood," then such an intrusion can confer standing. However, "[t]he language of a bylaw cannot be sufficient in itself to confer standing: the creation of a protected interest (by statute, ordinance, bylaw, or otherwise) cannot be conflated with the additional, individualized requirements that establish standing. To conclude that a plaintiff can derive standing . . . from the language of a relevant bylaw, without more, eliminates the requirement that a plaintiff 'plausibly demonstrate' a cognizable interest in order to establish that he is 'aggrieved.'" *Sweenie v. A.L. Prime Energy Consultants*, 451 Mass. 539, 545 (2008), quoting *Standerwick*, 447 Mass. at 30. The plaintiffs are still required to produce credible evidence to bring themselves within the legal scope of the protected interest created by the Bylaw. They bear the burden of substantiating their claims regarding any potential impact to their property values to bring themselves within the legal scope of that interest.

B. Credible Expert Evidence

The plaintiffs must provide factual support for their claims of particularized injury, sufficient for "a reasonable person . . . to conclude that the claimed injury likely will flow form the board's action." *Butler v. City of Waltham*, 63 Mass. App. Ct. 435, 441 (2005). To establish that special and different injury, and thus their standing, the plaintiffs must present evidence that is both quantitatively and qualitatively sufficient. *Michaels v. Zoning Bd. of Appeals of Wakefield*, 71 Mass. App. Ct. 449, 451 (2008). "Quantitatively, the evidence must provide

specific factual support for each of the claims of particularized injury the plaintiff has made. Qualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board's action." *Butler,* 63 Mass. App. Ct. at 441, citing *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 724 (1996).

The plaintiffs have presented credible evidence to support their claims through the presentation of expert testimony showing that the ISFSI and continued operation of Pilgrim negatively impact their property values. Plaintiffs Diane Buckbee (Buckbee), Donna Barrett (Barrett), and Virginia Curcio (Curcio) testified at trial about the basis for their concerns that Entergy's use of the site for the ISFSI will diminish their property values. They testified as to the general characteristics of their property, location and proximity of their property to Pilgrim, and negative attention they personally noticed in the media regarding the ISFSI at Pilgrim. Buckbee and Curcio also testified as to their future plans for putting their properties on the market as part of their retirement plans.

The plaintiffs' testimony was bolstered by testimony given by Dr. Stephen Sheppard (Dr. Sheppard), a professor of economics at Williams College who specializes in evaluating the impact of disamenities on local real estate markets and who has specifically studied the impact of Pilgrim on the market in Plymouth. At trial, Dr. Sheppard opined that the presence of the ISFSI and extended life of the Plant would cause a diminution in property values within a two-mile radius of Pilgrim. Dr. Sheppard based his testimony on his lengthy experience as an economist specializing in urban economies, analysis of available studies, media articles, and his personal involvement in the collection and analysis of local real estate data.

Dr. Sheppard relies on multiple published studies that support his conclusion, in particular, the Metz & Clark (1997) and Clark & Allison (1999) studies. While the Metz & Clark study found no property value effect per mile moved away from the Rancho Seco, a decommissioned nuclear plant in California with an ISFSI, the Clark & Allison study demonstrates a statistically significant increase in real housing prices per mile moved away from the Rancho Seco. While Entergy contends that the results of the Metz & Clark study cut against plaintiffs' alleged harms to property values, Dr. Sheppard stated that he relied more heavily on the Clark & Allison study since it was newer, used a larger sample size, and utilized more hedonic variables than the Metz & Clark study. Dr. Sheppard's justifications for according more weight to the Clark & Allison study are reasonable and the study supports his conclusions.

Further, Dr. Sheppard based his analysis on a 2009 study and paper by Brian Prest entitled "Measuring the Externalities of Nuclear Power: A Hedonic Study" (Prest Study). The Prest Study uses local property data and analyzes the impact of Pilgrim and presence of the ISFSI on the Plymouth real estate market. Entergy asserts that this is not credible evidence to support Dr. Sheppard's opinions because the Prest Study is an unpublished undergraduate research paper. Entergy overlooks the fact that the Prest Study was completed by a student under the supervision of Dr. Sheppard, including his oversight of the data used and methodologies applied. Dr. Sheppard utilizes the Prest Study to support his determination that the Plant itself is a disamenity that depresses the value of the plaintiffs' properties and this depressive effect is only allowed to continue due to the ISFSI. Dr. Sheppard attested that he did not rely on the conclusions in the Prest Study in forming his ultimate opinion that both Pilgrim and the ISFSI impact property values within a two-mile radius.

Entergy also attacks Dr. Sheppard's reliance on numerous media reports to show an impact on surrounding property values, but provides no expert testimony to counter his testimony. Entergy asserts that because the articles do not explicitly state that the ISFSI will cause a reduction in real estate values the articles were irrelevant to Dr. Sheppard's analysis. Dr. Sheppard, however, only relied on the media articles to establish a basis for the perception of risk experienced by reasonably informed real estate market participants and the homeowners. Moreover, because hedonic modeling includes media coverage as a factor, his reliance on the reports is not unreasonable. The media articles provide a basis for the perception of risk that the plaintiffs' testified they experience due to their close proximity to Pilgrim and the new ISFSI. Thus, the plaintiffs have provided credible evidence of their particularized injury that support the denial of Entergy's motion to dismiss.

C. Particularized Injury

While the term "person aggrieved" is not to be narrowly construed, it is not enough to have "a general civil interest in the enforcement of the zoning ordinance." *Waltham Motor Inn v. LaCava*, 3 Mass. App. Ct. 210, 218 (1976). "To show an infringement of legal rights, the plaintiff must show that the injury flowing from the board's action is special and different from the injury the action will cause the community at large." *Butler*, 63 Mass. App. Ct. at 440; *Barvenik v. Bd. of Aldermen of Newton,* 33 Mass. App. Ct. 129, 132 (1992) ("To qualify for that limited class, a plaintiff must establish-by direct facts and not by speculative personal opinion-that his injury is special and different from the concerns of the rest of the community."); *Bell v. Zoning Bd. of Appeals of Gloucester,* 429 Mass. 551, 554 (1999); *Nickerson v. Zoning Bd. of Appeals of Raynham,* 53 Mass. App. Ct. 680, 682 (2002).

Claims of aggrievement which are merely reflective of the broader concerns of the local community are not sufficient to confer standing upon a plaintiff under G. L. c. 40A, § 17. *Denneny v. Zoning Bd. of Appeals of Seekonk,* 59 Mass. App .Ct. 208, 211-212 (2003). A plaintiff's claims that "it hurts the whole town by granting this kind of a variance;" and that "nobody in the neighborhood wants [defendant's] house to be built" clearly fall into the category of claims of aggrievement which are merely reflective of the broader concerns of the local community, and which are insufficiently specific to any private interest of the plaintiff to confer the requisite standing. *Rhines v. Figuerido,* No. 345085, 2008 WL 2623937 at *5 (Land Ct. July 1, 2008); *Denneny,* 59 Mass. App. Ct. at 211-212. "A general civil interest in the enforcement of zoning laws . . . is not enough to confer standing." *Denneny*, 59 Mass. App. Ct. at 215. The evidence must demonstrate that plaintiff is among a subclass of "persons aggrieved," separate from the general community.

In this case, the plaintiffs have presented credible evidence that the presence of the ISFSI will cause a diminution in their property values, since their residences are located within two miles from the Pilgrim Nuclear Plant. As previously mentioned, the diminution in the value of real estate is derivative of and related to cognizable claims for enforcement of the Bylaw. Entergy argues that because all residents within a two-mile radius of Pilgrim are similarly affected by Pilgrim and the ISFSI, the plaintiffs cannot show an injury to their property values that is special and different. However, the cases previously cited require only that the harms alleged be distinguishable from those harms that could be raised by other members of the community.

Plaintiffs' injury is different from the "community" and other residents of Plymouth because the only properties whose values are effected have been shown to lie within a two-mile

radius of the ISFSI. The plaintiffs' particular source of aggrievement arises from their close proximity to Pilgrim and the new long-term nuclear waste storage site that causes them to experience the harm more intensely than other residents. These are not the type of claims that every citizen of Plymouth can assert on a zoning appeal. Indeed, as Dr. Sheppard testified, the ISFSI's effect on property values grows less the farther a property is from Pilgrim. This harm, particular to the residents closest to the Plant, is sufficient for the plaintiffs to qualify as a limited class within the greater community of Plymouth who have standing to bring a zoning challenge. No case has put a limit on the number of potentially aggrieved persons, so long as they can show that their harm is unique and distinguishable. Merely because the alleged harm has more far-reaching impacts to local property owners than other typical zoning violations, does not mean that the plaintiffs must present additional proof that their injury is also distinct from residents within the two mile radius of Pilgrim. Nothing in the cases requires a plaintiff to overcome the more onerous burden of also demonstrating that their harm is also different from other similarly affected residents.

CONCLUSION

Based on the aforementioned, Entergy's Motion for Mandatory Dismissal is DENIED WITHOUT PREJUDICE. This case will proceed to trial on the merits beginning on August 22, 2016 at 9:30 A.M.

SO ORDERED

By the Court (Foster, J.)

Attest:

Deborah J. Patterson, Recorder

Dated: August 17, 2016

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER